

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA
(DIVISION 2)

FRS17 v Minister for Immigration and Border Protection [2022]

FedCFamC2G 808

File number(s):	SYG 4006 of 2017
Judgment of:	JUDGE YOUNG
Date of judgment:	1 September 2022
Catchwords:	MIGRATION - application for judicial review of decision of the Immigration Assessment Authority - concerning two applications for protection visas - where the applicants are brothers - where the applicants claim they fear persecution by the Taliban - where the applicants have produced bogus documents – Court satisfied applications should be dismissed
Legislation:	<i>Migration Act 1958</i> (Cth) ss 5, 36, 91W, 91WA, 473CC <i>Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rule 2021</i> Sch 2
Cases cited:	<i>BGM16 v The Minister</i> [2017] FCAFC 72 <i>Plaintiff M174/2016 v Minister for Immigration and Border Protection</i> [2018] 264 CLR 217
Division:	Division 2 General Federal Law
Number of paragraphs:	21
Date of hearing:	1 September 2022
Place:	Darwin
Counsel for the Applicant:	Mr Tully
Solicitor for the Applicant:	Ryburn Solicitor
Counsel for the Respondents:	Mr Johnson
Solicitor for the Respondents:	HWL Ebsworth

ORDERS

SYG 4006 of 2017

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

BETWEEN: **FRS17**
 Applicant

AND: **MINISTER FOR IMMIGRATION AND BORDER**
 PROTECTION
 First Respondent

IMMIGRATION ASSESSMENT AUTHORITY
Second Respondent

ORDER MADE BY: JUDGE YOUNG

DATE OF ORDER: 1 SEPTEMBER 2022

THE COURT ORDERS THAT:

1. Time to apply be extended to 19 December 2017.
2. The application of 19 December 2017 be dismissed.
3. The Applicant is to pay the costs of the First Respondent fixed in the sum of \$4,320.

Note: The form of the order is subject to the entry in the Court's records.

Note: The Court may vary or set aside a judgment or order to remedy minor typographical or grammatical errors (r 17.05(2)(g) *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth)), or to record a variation to the order pursuant to r 17.05 *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth).

REASONS FOR JUDGMENT

Ex Tempore

JUDGE YOUNG

- 1 These are two applications for judicial review of decisions of the Immigration Assessment Authority (“the Authority”) affirming decisions of the Minister’s delegate (“the delegate”) to refuse each of the applicants a protection visa.
- 2 The grounds of review in each case are the same and the submissions of the applicants’ counsel, both represented by Mr Tully, were the same in each case. The applications have been heard together and for convenience these reasons are to be read as to applying to both applicants.
- 3 I will deal first with the question of extension of time. Both applications were made three days outside the 35 day time limit. The applicants’ solicitor has filed an affidavit which takes responsibility for the delay, that it has occurred within her office and there was no default by either of the applicants. The Minister has not taken issue with that. I accept what Ms Raeburn has to say about the explanation for the delay and having regard to the very short delay, I consider that the time should be extended in the interest of the administration of justice. I am aware that often the merits of an application will weigh heavily in those scales but in this case, I consider the matters that I have just referred to are the most significant and in each case time will be extended to the date the applications were filed.
- 4 The applicants are citizens of Afghanistan who arrived in Australia as unauthorised maritime arrivals. In their application for a protection visa, made in 2017, the applicants each provided a false identity document called a ‘Taskera’, which purported to set out evidence of each applicants’ identity, nationality or citizenship. In each case the documents provided false information as to the applicants’ family name, family relationships and province of origin. The false information appeared to support each applicant’s refugee claims.
- 5 The refugee claims advanced were that they were members of a minority group in Afghanistan and possessed a surname associated with that minority. They said they originated from Maidan Wardak Province and their father had been killed by the Taliban in 2012 because he was opposed to the Taliban. The applicants profess to have a well-founded

fear of persecution related to these claims. The delegate was not satisfied that the claims were made out. The applicants applied for a review of those decisions to the Authority.

6 In October 2017, the applicants each submitted statutory declarations to the Authority admitting that the information provided to the delegate in the identity documents was false. In particular, they admitted that the family name was false, the province of origin was false and certain other details of identity were false. The statutory declarations admitted that the fundamental refugee claims made to the delegate were false, including that the father of the applicants had been killed by the Taliban.

7 There was also some reference to a marriage certificate and a death certificate but these did not figure in any significant way in the submissions before me and I propose to ignore them. The Authority concluded that the provision of a false identity document was, in the case of FRS17, the production of a bogus document in response to a request for documentary evidence of the applicant's identity, nationality or citizenship within the terms of section 91W of the *Migration Act 1958* (Cth) ("the Act"). In the case of FRR17, the Authority concluded that he provided a bogus document as evidence of identity, nationality or citizenship within the terms of section 91WA of the Act. The Authority concluded in each case that it must refuse to grant the applicant a protection visa in accordance with the requirements of section 91W(2) and section 91WA(1) of the Act, respectively. The Authority was not satisfied in either case that the applicant had a reasonable explanation for producing or providing the bogus document.

8 In the course of its reasons the Authority referred to earlier applications by or on behalf of the applicants made in 2000 or 2005 for a GSH visa which was a form of refugee visa available at that time. The information provided then was inconsistent with the applicants' more recent claims. It was not suggested that the earlier claims were false. Those earlier claims were rejected but information provided at that time appears to have alerted the Australian authorities to the production or provision of bogus documents. Given the admissions of the applicants, it appears the immigration authorities were alerted that the refugee claims made in 2017 were false.

The grounds of review

9 Ground 1 alleges that the Authority fell into jurisdictional error by describing the identity documents as "counterfeit", referring to one of the subsets of "bogus document" in the definition of section 5 of the Act. It was not submitted that this error, if it was an error, was

material or in what way it may have been material. However, I am satisfied that the Authority correctly described the identity documents as “counterfeit”. One of the meanings of counterfeit as an adjective is “not genuine”. Another meaning of the adjective “counterfeit” is “pretended”. See, for example, the Macquarie dictionary.

10 Counsel for the Minister submitted that the word should be given its ordinary meaning in the statute and the identity documents produced or provided by the applicants were, on their own admissions, not genuine and accordingly, the use of the word counterfeit was appropriate. I accept that submission. This ground is not made out.

11 Ground 2 alleges that the Authority impermissibly considered the applicants’ prior migration history in considering whether they had a reasonable explanation for producing or providing the bogus document or documents. Counsel for the applicants relied on the case of *BGM16 v The Minister* [2017] FCAFC 72.

12 In that case the Full Court held that for the purposes of section 91WA of the Act, the provision of the bogus document must occur in the course of the protection visa application. In that case the applicant for the protection visa had provided false documents in a prior student visa application and in a prior application for a driver’s licence. The members of the Full Court held this conduct was irrelevant to the considerations required in section 91WA of the Act.

13 In this case the relevant bogus document was provided to the delegate in the course of the protection visa application in 2017. It was not suggested by the Authority that the information provided by the applicants in 2000 or 2005 was false or bogus. Rather, those applications were referred to, to demonstrate the inconsistency with the 2017 application of the applicants.

14 I am not satisfied that the Authority has committed the error identified in *BGM16* or, indeed, any error under this ground and the ground is not made out.

15 Ground 3 alleged that the authority did not discharge its statutory obligation under section 473CC of the Act to “review a fast-track decision”, as these decisions undoubtedly were. Counsel for the applicant said that in a “review” it was not enough for the Authority simply to identify a factor that disqualified an applicant, such as the production of a bogus document without reasonable explanation under section 91W or section 91WA, and then simply proceed to affirm the delegate’s decision. It was said that a “review” must involve a consideration of,

for example, the refugee criteria in section 36(2) of the Act if that was in issue, as it was in this case before the Delegate.

16 Counsel for the applicant frankly conceded he had no authority in support of the submission but it was said to flow from consideration of the statutory context. I had difficulty in understanding the submission. I am not satisfied there is support in the statutory context for the submission. The section itself offers two options: (a) to affirm the fast-track decision or (b) to remit the decision for reconsideration in accordance with such directions or recommendations of the Authority as are permitted by the regulations.

17 In this case, where the Authority was satisfied that sections 91W or 91WA require that a visa must not be granted to the applicants, it would appear futile to require consideration of the matters considered by the delegate which were no longer relevant. I accept the submission of Counsel for the Minister that the approach of the Authority was consistent with the passage from the majority of the High Court (Gageler, Keane and Nettle JJ) in *Plaintiff M174/2016 v Minister for Immigration and Border Protection* [2018] 264 CLR 217. At paragraph [17] their Honours said:

The task of the Authority under section 473CC (1) is to consider the application for a protection visa afresh and to determine for itself whether or not it is satisfied that the criteria for the grant of the visa have been met. The powers conferred on the Authority by s 473CC(2) then enable the Authority to make orders appropriate to give effect to the outcome of its own determination of the merits. If the Authority is not satisfied that the criteria for the grant of the visa have been met, the appropriate order for the Authority to make is to affirm the decision under review.

18 It is clear from that passage that the task of the Authority under section 473CC is to consider the application afresh and to consider for itself whether the criteria for a grant of a visa are satisfied. The powers of the Authority under 473CC (2) are to make orders appropriate to give effect to the outcome of its own determination. I am satisfied that the decision-making process of the Authority was in conformity with the process described in that passage. This ground is not made out. The application is dismissed.

Costs

19 This is the conclusion of a hearing of two applications for judicial review. Both matters were identical in all significant ways. The applicants were represented very efficiently and well by Mr Tully. The Minister was represented very efficiently and well by Mr Johnson. The whole matter appears to me to have been conducted with dispatch and economy.

- 20 I do not see any evidence of repeated interlocutory applications or anything of that kind. Mr Johnson, who was arguing against my proposal for, basically, a heavy discount of the scale amount of \$7,853 because of the duplication in each matter, suggested that there was at one point the necessity for some redrafting of his submissions. I have read the original submissions and I also read the redrafted submissions and I accept that, as he says, it was necessary but it did not make much difference in my assessment.
- 21 I consider that the just outcome in all the circumstances is that each applicant should pay 55 per cent of the scale amount appearing in Schedule 2 of the *Federal Circuit and Family Court of Australia (Division 2)(General Federal Law) Rule 2021*. That amount is \$4,320.

I certify that the preceding twenty-one (21) numbered paragraphs are a true copy of the Reasons for Judgment of Judge Young.

Associate:

Dated: 4 October 2022